In The

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,
Petitioner,

vs.

JOHN R. WINEGARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa issued on October 19, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa is reported at 258 N. W. 2d 847 (Iowa 1977) and is set forth in Appendix A. The order denying the petitioner's petition for rehearing is unreported and is set forth in Appendix B.

JURISDICTION

The judgment of the Supreme Court of Iowa was made and entered on October 19, 1977. The petition for

rehearing, filed by the Des Moines Register and Tribune Company and Diane Graham on behalf of the Hon. Leo Oxberger, was denied on December 19, 1977. The jurisdiction of this court is invoked under 28 U. S. C. § 1257 (3).

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QUESTIONS PRESENTED

1. Whether a state court in a civil action can ever override an acknowledged constitutional right protected by the First Amendment and order the disclosure of confidential information held by a news reporter simply by relying upon a common law statement that "the public has a right to every person's evidence"?

2. Whether a state court in a civil action can grant a motion to compel discovery of information held by a news reporter where there has been no showing that alternative methods of discovery have been exhausted?

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press; . . . "

Amendment XIV

" . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

The Des Moines Register and Tribune Company (hereafter Company) and Diane Graham, a journalist and news reporter for the Company, on behalf of the petitioner herein, the Hon. Leo Oxberger, then a state judge of Iowa's Fifth Judicial District, seek review of a decision of the Iowa Supreme Court which, in effect, allows the subpoena and deposition of a non-party news reporter in civil litigation without any showing that the need for discovery overrides the protections of the First Amendment and without the need for exhausting other avenues of discovery.

The matter now before this Court is an outgrowth of a tangle of litigation that began more than three years ago, when Sally Ann Winegard, claiming to be the common law wife of the Respondent, John R. Winegard, brought an action for Dissolution of Marriage in a Burlington, Iowa, state court. In October, 1974, the state district court held that a common law marriage did exist, and Winegard appealed that decision to the Iowa Supreme Court. In doing so, Winegard made no attempt to have the record of the case sealed to protect his privacy. The Iowa Supreme Court dismissed Winegard's appeal as inappropriate.

Following the adverse determination by the Iowa Supreme Court, Winegard filed another suit in U. S. District Court for the Southern District of Iowa, again disclosing the existing common law marriage, seeking to have certain of the Iowa Rules of Civil Procedure declared unconstitutional. This action was brought to prevent Sally

Ann Winegard from discovering financial information concerning Winegard, a wealthy Iowa business entrepreneur, during the dissolution of marriage proceedings. That suit quickly was dismissed by the U. S. District Court as "frivolous." *Winegard v. Anderkin,* Case No. 74-333-1 (S. D. Ia., April 3, 1975).

As a result of Winegard's federal law suit, Diane Graham, a news reporter for the Company, became aware of the unique questions surrounding the Winegard dissolution of marriage. In January, 1975, Miss Graham began to prepare a news article concerning the Winegard matters, and in doing so she examined legal documents on file as part of the public court record and also followed customary journalistic practice by seeking to verify facts through other available sources.

Miss Graham wrote a news article on the case which was published in the January 8, 1975, issue of the evening Des Moines Tribune and which was republished in substantially the same form in the following morning's editions of the Des Moines Register. One of the persons quoted in the news article was Stephen Schalk, an attorney for Sally Ann Winegard.

Two days after the news articles appeared, on January 10, 1975, Winegard filed a civil action in Scott County District Court in Davenport, Iowa, against Larsen, Schalk and Bradfield, the law firm representing Sally Ann Winegard. The civil action alleged that Winegard had been defamed and his privacy invaded as a result of the publi-

cation of the articles in the January 8 Tribune and January 9 Register.[1]

As the very first step in pursuing the cause of action against his wife's attorneys, Winegard issued subpoenas and notices of deposition to Miss Graham and the Company. On March 1, 1975, Miss Graham and the Company appeared for deposition in Des Moines, Iowa, authenticated the articles in question as substantially true and correct, and declined to answer over 100 other far-ranging questions concerning the substance of confidential conversations with news sources and editing procedures, on the grounds that these questions violated a qualified news gatherer's privilege and her rights under the First Amendment to the United States Constitution and Article I of the Iowa Constitution.

At no time during the course of his litigation against his wife's lawyers has Winegard attempted to depose any member of the defendant law firm.

Both Miss Graham and the Company applied to Polk County District Court in Des Moines for a protective order insulating them from Winegard's demands for confidential information and information about the editorial processes of the newspapers. John Winegard then filed a motion to compel discovery, again in Polk County District Court, a motion which was resisted by Miss Graham and the Company on the theory that such discovery would violate constitutional rights of the press.

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1 The Scott County District Court subsequently granted a motion for summary judgment against Winegard on the claim of invasion of privacy, a decision upheld by the Iowa Supreme Court on December 21, 1977, *Winegard v. Larsen,* 260 N. W. 2d 816 (Iowa 1977).

On May 6, 1975, Polk County District Court Judge Leo Oxberger denied Winegard's motion to compel discovery, holding that the burden of proof rested with Winegard to show the need for such discovery. Judge Oxberger ruled that:

> "In light of the above discussion, a reporter or publisher under the First Amendment to the Constitution is not subject to court discovery procedures when such discovery is directed to ascertain the confidential sources of information, the substance of conversation with these sources, or the editing procedures which produce the articles unless the party seeking such establishes by clear and convincing proof that:
>
> 1. there exists a critical need for such information in order to maintain a cause of action [or] a defense to a cause of action.
> 2. this critical need be of such import to the cause of action or defense that it clearly overrides the strong protections afforded to the First Amendment.
> 3. all possible alternate sources of the information sought have been exhausted.
> 4. the information sought is relevant and material to the cause of action or defense involved."[2]

Winegard sought review of Judge Oxberger's decision by the Iowa Supreme Court, asking the court to find the Judge's action illegal. Winegard asserted that the First Amendment contains no qualified privilege which would protect confidential information held by news reporters. The Company and Miss Graham, appearing on behalf of

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2 *Winegard v. Larsen,* Case No. CL8-4250, May 8, 1975, summarized in *Winegard v. Oxberger,* 260 N. W. 2d 816 (Iowa 1977).

Judge Oxberger (who was made the nominal defendant by Iowa's civil procedure rules), relied upon the weight of precedent supporting a qualified privilege for news reporters, and urged the court to adopt the four-part test used by Judge Oxberger to determine whether discovery of a news reporter's confidential information and journalistic work product is appropriate.

In its opinion, the Iowa Supreme Court acknowledged the existence of a qualified privilege for news reporters, but adopted a three-part test which severely limits the applicability of the privilege. The Iowa court held that discovery of a news reporter's confidential information and work product during the course of a civil action may be had if (1) the information is necessary or critical to the involved cause of action or defense pled; (2) that other reasonable means available by which to obtain the information sought have been exhausted; and (3) it does not appear from the record that the action or defense is patently frivolous. *Winegard v. Oxberger,* 258 N. W. 2d at 852 (Iowa 1977).

The court found that Winegard had met this three-part test, and held that Judge Oxberger's action was improper.

A petition for rehearing of the case was filed by Miss Graham and the Company on December 5, 1977, asserting that the Court erred in finding: (1) that a litigant using pretrial discovery is not required to show that the litigant's need for information clearly overrides the First Amendment's strong protections, and (2) that a simple request for admissions to an opposing party, which can be generally denied, will suffice as "exhaustion" of alter-

native methods of discovery, particularly where a litigant has made no attempt to depose an opposing party but instead selects a non-party news reporter as the only person to be deposed during the course of discovery. This petition for rehearing was denied by the Iowa Supreme Court on December 19, 1977.

(As a final footnote to the tangle of litigation fostered by Winegard, after three law suits, multiple appeals and years of litigation, Winegard finally lost his central point. In September, 1977, Winegard appealed yet again to the Iowa Supreme Court, after a state trial court had awarded temporary attorneys fees to his wife. In a lengthy opinion, the Iowa Supreme Court affirmed the trial court's finding that a common law marriage existed between Winegard and Sally Ann, and affirmed the award of attorney's fees to Mrs. Winegard. *In re the Marriage of Winegard,* 257 N. W. 2d 609 (Iowa 1977).)

ARGUMENT

I.

The Iowa Supreme Court erred in failing to hold that the First Amendment requires a clear and convincing showing that a litigant's need for a news reporter's information overrides the strong protections afforded by the First Amendment.

The decision of the Iowa Supreme Court purports to acknowledge a constitutionally based qualified privilege

for news reporters, stating that "where, as in the case before us, there is a significant encroachment upon some given constitutional right, it can be justified only upon a subordinating state interest which is compelling. *Bates v. City of Little Rock,* 361 U. S. 516 (1960); *NAACP v. Alabama,* 357 U. S. 449 (1958)." 258 N. W. 2d at 850. But in seeking a "compelling state interest" the Iowa Supreme Court found that state interest in the "long standing principle that the public has a right to every person's evidence." 258 N. W. 2d at 850. Such a vague standard leaves no room for the protection of delicate First Amendment rights. Absent a requirement that a litigant must make a clear and convincing demonstration of the critical need for a news reporter's confidential information, such a loose standard invites litigants to substitute the investigatory work of the news person for traditional discovery methods.

A court can never set aside the First Amendment unless there is a truly compelling interest to justify the infringement. The balance is always weighed in favor of the First Amendment protections unless the competing interest is so vital and so strong as to override basic constitutional protections. The U. S. Supreme Court traditionally has acted to protect First Amendment freedoms from vague standards which invite incursion into press freedoms without a showing of a specific, compelling, and overriding state interest. See, *DeGregory v. Attorney General of New Hampshire,* 383 U. S. 825 (1966); *NAACP v. Button,* 371 U. S. 415 (1963); *Bates v. Little Rock,* 361 U. S. 516 (1960); *NAACP v. Alabama,* 357 U. S. 449 (1958); *Thomas v. Collins,* 323 U. S. 516 (1945); *Schneider v. State,* 308 U. S. 147 (1939). Even the threat of assassi-

nation to a President of the United States has been held *not* to be compelling in this regard. *Bursey v. United States,* 466 F. 2d 1059 (9th Cir. 1972).

The Iowa Supreme Court found that the general duty of all persons to testify provided a "compelling interest," relying principally upon aging decisions in *United States v. Bryan,* 339 U. S. 323 (1950), and *Blackmer v. United States,* 284 U. S. 421 (1932). The Iowa Supreme Court's holding clearly fails to acknowledge the far-reaching development of the First Amendment since *New York Times v. Sullivan,* 376 U. S. 254 (1964), first brought the law of defamation within the requirements of the First Amendment. In a line of evolving cases, the U. S. Supreme Court has more recently enunciated and developed the principle that the editorial process of the press is entitled to special protections. See, e.g., *Miami Herald Publishing Co. v. Tornillo,* 418 U. S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U. S. 94 (1974); *New York Times v. Sullivan,* 376 U. S. 254 (1964).

In *Branzburg v. Hayes,* 408 U. S. 665 (1972), this Court held that a news reporter cannot refuse to disclose confidential information when called before a grand jury *in a criminal case.* While that principle retains full vitality, many courts have been willing to establish a qualified privilege for news reporters in a civil setting, particularly in frivolous and marginal cases such as Winegard's case, where the news reporter is not a party to the litigation. See, *Herbert v. Lando,* — F. 2d — (2d Cir. 1977), 3 Med. L. Rptr. 1241; *Silkwood v. Kerr-McGee,* 563 F. 2d 433 (10th Cir. 1977); *Cervantes v. Time, Inc.,* 330 F. Supp. 936 (E. D. Mo. 1971), aff'd. 464 F. 2d 986 (8th Cir. 1972), *cert. den.* 409 U. S. 1125 (1973); *Richards of*

Rockford, Inc. v. Pacific Gas and Electric Co., 71 F. R. D. 388 (N. D. Cal. 1976); *Apicella v. McNeil Laboratories,* 66 F. R. D. 78 (E. D. N. Y. 1975). Many of these cases relied in part upon *Baker v. F&F Investment Co.,* 470 F. 2d 778 (2d Cir. 1972), and in *Richards, supra,* the court used the *Baker* analysis to develop a proper balancing test:

> " . . . the cases involving newsmen provide useful guidelines for striking a balance between discovery and non-disclosure: the nature of the proceeding, whether the deponent is a party, whether the information sought is available from other sources. . . . " 71 F. R. D. 388 at 390.

The vague and unworkable test enunciated by the Iowa Supreme Court fails to provide sufficient safeguards to insure that First Amendment freedoms will remain intact. The Iowa standard as interpreted by the Iowa Supreme Court would allow basic rights of the press to be trampled upon in any civil action as long as a news reporter's subpoena is preceded by any flimsy attempt to gather information from any other source, making the press a likely target for time-consuming and irrelevant fishing expeditions like the pointless fishing expedition the tangled Winegard litigation has thrust upon Miss Graham and the Company. This Court must strengthen and clarify the standard of the Iowa Supreme Court in order to protect First Amendment freedoms from infringement. As this Court noted in *Erznoznik v. City of Jacksonville,* 422 U. S. 205 (1975): "Where First Amendment freedoms are at stake, we have repeatedly emphasized that precision of drafting and clarity of purpose are essential."

II.

The Iowa Supreme Court erred in failing to hold that discovery of a non-party news reporter in a civil action is improper until all other reasonable and practicable means of obtaining the information have been exhausted.

The standard set forth by the Iowa Supreme Court includes the element "that other reasonable means available by which to obtain the information sought have been exhausted." 258 N. W. 2d 847 at 852. The Iowa Supreme Court went on to hold, however, that Winegard had "exhausted" such alternative means of discovery simply by serving a simple "Request for Admissions," which was subsequently denied by the defendant, Stephen Schalk. As a practical matter, a simple "Request for Admissions" under Iowa's procedural rules rarely yields much useful information, since the request can be easily evaded with simple "yes" or "no" answers. In holding that a simple "Request for Admissions" is sufficient, the Iowa Supreme Court's decision flies in the face of precedent and hence creates a conflict of laws question involving a fundamental constitutional right. In *Garland v. Torre,* 259 F. 2d 545 (2nd Cir. 1958), the Second Circuit held that "reasonable" discovery of alternative sources was, at a minimum, *full* oral depositions of other witnesses before an attempt to discover the news reporter was sanctioned. In the instant case, Winegard made no attempt to depose his opposing party, Stephen Schalk, or any of the members of his law firm. The clear weight of precedent would indicate that discovery of Miss Graham and the Company is not proper in such a case, particularly where Winegard has alleged no hardship or ex-

tenuating circumstances that would prevent him from carrying on a thorough, oral deposition of other available witnesses which was bound to yield the same information as that sought from the press.

At a minimum, a litigant must be required to depose his opposing party when it appears likely that such a deposition would eliminate the need for discovery infringing upon sensitive rights of the press. The Constitutional protections for news reporters must be guarded even more vigilantly when the news reporter is a mere stranger to the litigation. See, *Bursey v. United States,* 466 F. 2d 1059 (9th Cir. 1972); *Baker v. F&F Investment Co.,* 470 F. 2d 783 (2nd Cir. 1972); *Democratic National Committee v. McCord,* 356 F. Supp. 1394 (D. D. C. 1973); *Apicella v. McNeil Laboratories,* 66 F. R. D. 78 (E. D. N. Y. 1975); *Richards of Rockford v. Pacific Gas and Electric Co.,* 71 F. R. D. 388 (N. D. Cal. 1976).[3]

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3 In the recently decided case of *Caldero v. Tribune Publishing Co.,* 98 Idaho 288, 562 P. 2d 791 (Idaho, 1977); cert. den., — U. S. —, 46 U. S. L. W. 3294 (Oct. 31, 1977), the Idaho Supreme Court found that disclosure of certain confidential information may be proper where the news reporter is the only source available and where the news reporter is a party to the litigation. This is not the case in the matter now before the Court. John Winegard's cause of action is against his wife's attorneys, not Miss Graham or the Company, yet Miss Graham was the first —and only—target of Winegard's subpoena.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Iowa Supreme Court.

Respectfully submitted,

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APPENDICES A AND B

APPENDIX A

IN THE SUPREME COURT OF IOWA

JOHN R. WINEGARD,

Petitioner,

vs.

HON. LEO OXBERGER, Judge of the 5th Judicial District of Iowa,

Respondent.

(Filed October 19, 1977)

Original certiorari to determine whether respondent judge exceeded his proper jurisdiction or otherwise acted illegally in overruling petitioner's motions to compel discovery of a newsperson, and to sequester a predecree order filed in a pending marriage dissolution action.—Writ sustained.

RAWLINGS, J.

This is an original certiorari proceeding to determine whether respondent judge exceeded his proper jurisdiction or otherwise acted illegally in overruling petitioner's motions to compel discovery of a newsperson, and to sequester a predecree order filed in a pending marriage dissolution action. We sustain the writ.

February 6, 1973, Sally Ann Winegard (Sally) commenced proceedings in Des Moines District Court (District Court) for dissolution of a common-law marriage she claims existed between her and John R. Winegard. (Winegard) October 18, 1974, District Court, upon findings

of fact and conclusions of law, held a valid marriage existed as between these two persons.

Winegard then unsuccessfully applied to this court for permission to effect an interlocutory appeal. Attached to the application was a copy of the District Court adjudication.

Subsequently, Sally attempted to discover financial information from Winegard. He, in turn, sought declaratory and injunctive relief from such discovery in federal district court. A copy of the interrogatories submitted by Sally to Winegard was there made a part of the latter's pleadings. April 3, 1975, this action was dismissed on jurisdictional grounds.

Meanwhile, Diane Graham (Graham), a Des Moines Register and Tribune Company (Register) reporter assigned to examine the records in Des Moines courts, became conversant with the documents filed in connection with Winegard's federal action. She prepared two articles later published by the Register. They stated in some detail the facts underlying Sally's claim that a common-law marriage existed. Many of the statements therein contained were attributed to Stephen L. Schalk (Schalk), Sally's attorney in the marriage dissolution proceeding. Thereupon Winegard brought an action for damages in Scott District Court against the Schalk law firm members by reason of asserted invasion of privacy and defamation. The present proceeding is an outgrowth of that action.

March 1, 1975, as an action-related "discovery" approach, Winegard sought to depose Graham and obtain from her or the Register any information obtained and

notes made in preparation of the articles. Graham appeared pursuant to subpoena and testified she "substantially wrote" the articles which, to the best of her knowledge, were true and correct. She refused, however, on the basis of rights allegedly guaranteed by the First Amendment to the United States Constitution and article I, section 7, of the Iowa Constitution, to answer questions about conversations with or identity of her sources, preparation of the articles, and procedures followed in editing them.

Graham and the Register then applied to Polk District Court, pursuant to Iowa R. Civ. P. 123, for a protective order quashing the deposition-related subpoenas. Winegard moved to compel discovery under rule 134. April 1, 1975, hearing was had before Judge Leo Oxberger (respondent) on those motions. April 8, 1975, Winegard filed a written renewal of a motion to sequester (made orally at the hearing) and a motion to strike the copy of Winegard's interlocutory appeal application (with District Court's ruling attached), which was Exhibit C of the application for protective order. Graham and the Register resisted.

Judge Oxberger overruled Winegard's motion to compel discovery. He concluded the First Amendment granted Graham a newsperson qualified privilege not to answer Winegard's questions, and in so doing fashioned a four-step test which Winegard was held not to have fulfilled. Respondent judge also denied motions to sequester and strike District Court's ruling, holding the language of Section 598.26, The Code 1973, did not apply to judicial findings of fact and conclusions of law.

June 12, 1975, this court granted certiorari and pursuant to Winegard's motion ordered sealed and sequestered "those papers constituting transcripts of testimony, documents, or proceedings or which copy any part thereof, in the dissolution action" pending this opinion. Included in the sequestration order was Exhibit C about which Winegard complained, together with Sally's interrogatories attached by Winegard to his federal court complaint, Exhibit B of Graham's application.

These are the broadly stated issues here to be resolved:

1. Does Code § 598.26 require that copies of judicial findings of fact and conclusions of law and interrogatories in a pending dissolution action be sealed or sequestered when filed in another court's public records?

2. Does the First Amendment, United States Constitution, or article I, section 7, Iowa Constitution, support recognition of a newsperson's privilege, and if so, has Winegard met his burden to override such privilege?

I. Our opinion in the case of In re Marriage of John Robert Winegard and Sally Ann Winegard, — N. W. 2d — (Iowa, September 1977), unavoidably portrays the entire factual situation which inheres in the first above stated question. Therefore it is now moot and the second issue alone will be entertained.

II. Our scope of review is amply developed in Hightower v. Peterson, 235 N. W. 2d 313, 316-317 (Iowa 1975), quoting State v. Cullison, 227 N. W. 2d 121, 126 (Iowa 1975), and need not be repeated.

III. To what extent, if any, does the First Amendment protect confidentiality of newsperson's sources and information? Although this is a question of first impression in Iowa, it has evoked a flood of litigation and commentary elsewhere. Unfortunately, controversy has only increased since Branzburg v. Hayes, 408 U. S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Despite the fact *Branzburg* dealt with criminal proceedings and did not reach specifics of the subject now before us, the Court did say, 408 U. S. at 704, 92 S. Ct. at 2668:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' "

Even more pointedly Schneider v. State of New Jersey, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155 (1939), says: "The freedom of speech and of the press secured by the First Amendment, U. S. C. A. Const., against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state."

In the same case, 308 U. S. at 161, 60 S. Ct. at 150-151, this observation appears:

> *"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties.* The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free

men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties. (emphasis supplied).

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

The foregoing effectively negates Winegard's claim to the effect there is no such thing as a constitutionally based newsperson's privilege.

Looking to the other side of the coin it will be recalled Graham and the Register do not assert a newsperson enjoys an absolute privilege from testifying in a civil proceeding. In essence they take the position Judge Oxberger was right in recognizing existence of a qualified privilege, subordinated if the questioner meets a four-factor test.

Winegard counters by positing that in event this court finds any or all of the four standards enunciated below are applicable they were met and respondent judge acted illegally in holding otherwise. For reasons later set forth we agree.

IV. Although this court is persuaded there exists a fundamental newsperson privilege we are equally satisfied it is not absolute or unlimited.

Admittedly the majority opinion in *Branzburg* fixed upon strong public interest in effective law enforcement but it also recognized "the longstanding principle that 'the public . . . has a right to every man's evidence', except for those persons protected by a constitutional, common-law, or statutory privilege, * * *." 408 U. S. at 688, 92 S. Ct. at 2660.

So, absent a local statute regarding a newsperson's privilege we look to constitutional or common-law precepts.

As above indicated, Winegard's right to Graham's testimony can be predicated in large part if not entirely upon the longstanding principle that the public has a right to every person's evidence.

Nevertheless, where as in the case before us, there is a significant encroachment upon some given constitutional right, it can be justified only upon a subordinating state interest which is compelling. Cf. Bates v. City of Little Rock, 361 U. S. 516, 524, 80 S. Ct. 412, 417, 4 L. Ed. 2d 480 (1960); NAACP v. Alabama, 357 U. S. 449, 462-463, 78 S. Ct. 1163, 1172, 2 L. Ed. 2d 1488 (1958).

However, we are persuaded such requirement is presently satisfied in light of this theorem set forth in United States v. Bryan, 339 U. S. 323, 331, 70 S. Ct. 724, 730, 94 L. Ed. 884 (1950):

"[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at

> the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty; which every person within the jurisdiction of the Government is bound to perform when properly summoned."

See also Blackmer v. United States, 284 U. S. 421, 438, 52 S. Ct. 252, 255, 76 L. Ed. 375 (1932).

And in Garland v. Torre, 259 F. 2d 545, 548-549 (2d Cir. 1958), cert. denied, 358 U. S. 910, 79 S. Ct. 237, 3 L. Ed. 2d 231, then Circuit Court Judge Potter Stewart teachably stated:

> "'[F]reedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom. That kind of determination often presents a 'delicate and difficult' task. Schneider v. State of New Jersey, 1939, 308 U. S. 147, 161, 60 S. Ct. 146, 161, 84 L. Ed. 155; American Communications Ass'n., C. I. O. v. Douds, supra, 339 U. S. at page 400, 70 S. Ct. at page 684 (and see cases cited in that opinion at pages 398 and 399, at pages 683 and 684 respectively). The task in the present case, though perhaps delicate, does not seem difficult.
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> " 'Liberty, in each of its phases, has its history and connotation.' Near v. State of Minnesota, supra, 283 U. S. at page 708, 51 S. Ct. at page 628. Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.

> "It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of the judicial power of the United States. Blair v. United States, 1919, 250 U. S. 273, 279-281, 39 S. Ct. 468, 63 L. Ed. 979; Wilson v. United States, 1911, 221 U. S. 361, 372-373, 31 S. Ct. 538, 55 L. Ed. 771; Blackmer v. United States, 1932, 284 U. S. 421, 438, 52 S. Ct. 252, 76 L. Ed. 375; United States v. Bryan, 1950, 339 U. S. 323, 331, 70 S. Ct. 724, 94 L. Ed. 884. Whether or not the freedom to invoke this judicial power be considered an element of fifth Amendment due process, its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: '[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.' Blackmer v. United States, supra, 284 U. S. at page 438, 52 S. Ct. at page 255.
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> "Without question, the exaction of this duty impinges sometimes, if not always, upon the First Amendment freedoms of the witness. Material sacrifice and the invasion of personal privacy are implicit in its performance. The freedom to choose whether to speak or be silent disappears. But '[t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.' Blair v. United States, supra, 250 U. S. at page 281, 39 S. Ct. at page 471.
>
> "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice."

Mindful of the foregoing this court now holds there exists, in the present case, an undiluted compelling state interest of such persuasive force as to subordinate a newsperson's privilege to withhold confidential information.

V. Next to be resolved is the appropriate criteria upon which the above holding shall be presently applied.

Our research reveals general usage of one or more of three qualifying standards which are, as commonly phrased:

(1) That the information is necessary or critical to the involved cause of action or defense pled. See, e. g., Garland v. Torre, 259 F. 2d 545; Carey v. Hume, 492 F. 2d 631 (D. C. 1974), cert. dismissed, 417 U. S. 938; Baker v. F & F Investment, 470 F. 2d 778 (2d Cir. 1972); Connecticut State Bd. of Labor Relations v. Fagin, 33 Conn. Supp. 204, 370 A. 2d 1095 (Super. Ct. 1976); Schwartz v. Time, Inc., 71 Misc. 2d 769, 337 N. Y. S. 2d 125 (1972); Brown v. Commonwealth, 214 Va. 755, 204 S. E. 2d 429 (1974), cert. denied, 419 U. S. 966, 95 S. Ct. 229, 42 L. Ed. 2d 182. As stated in *Garland,* 259 F. 2d at 550, often quoted as authority for this standard, the information sought should go to the heart of the questioner's claim. E. g., Apicella v. McNeil Labs, 66 F. R. D. 78, 81-82 (E. D. N. Y. 1975).

(2) That other reasonable means available by which to obtain the information sought have been exhausted. See, e. g., Bursey v. United States, 466 F. 2d 1059, 1083 (9th Cir., 1972); Garland v. Torre, 259 F. 2d at 551; Democratic National Committee v. McCord, 356 F. Supp. at 1396-1397. Cf. Shelton v. Tucker, 364 U. S. 479, 489-490, 81 S. Ct. 247, 252-253, 5 L. Ed. 2d 231 (1960).

(3) That it does not appear from the record the action or defense is patently frivolous. See, e. g., Carey v. Hume, Bursey v. United States, and Cervantes v. Time, Inc., all cited above; United States v. Liddy, 354 F. Supp. 208 (D. D. C. 1972).

These standards are hereby approved and adopted.

For purpose of clarity it is understood our holding today regarding a newsperson's privilege shall be deemed equally applicable to article I, section 7, of the Iowa Constitution. Cf. Chicago Title Ins. Co. v. Huff, 256 N. W. 2d 17, 23 (Iowa 1977), and citations.

VI. Now to be determined is the legality of the order entered below in light of our adopted three-prong standard.

At the outset we are satisfied Winegard's basic discovery objective is necessary and critical to his cause of action against Schalk, et al. More specifically Winegard needs to know what was said to Graham and by whom. It is not for us, however, to presently resolve the subject matter relevancy of any discovery-related questions which have been or may be put to Graham by Winegard. Rather a determination thereof must be left to trial court in the first instance, guided by this standard.

In light of the foregoing there is another facet of this appeal which must be put to rest. As heretofore stated, one of the elements Winegard was required to establish as a discovery prerequisite relates to a showing by the questioner that other reasonable avenues of information have been exhausted.

Noticeably, Winegard's invasion of privacy and defamation action is against Sally's attorneys, the Schalk law firm, not against the Register and Graham. Furthermore, Winegard's petition focuses upon two articles prepared by Graham and published by the Register, with defendant Schalk therein clearly identified as the informant.

The record also reveals, as aforesaid the hearing upon which Judge Oxberger acted was held April 1, 1975. It further appears that as an adjunct thereof Winegard filed his request for admissions, directed to Schalk, and the latter's responses. See Iowa R. Civ. P. 124 and 127. In brief, these documents were made a part of the record and available to respondent judge at all times material to the discovery-based proceeding below. No useful purpose will be served by here reciting the inquiries addressed to Mr. Schalk and his responses. In essence, this party admitted having conversed with Graham by phone about Winegard's federal court action, but denied having made statements attributed to him by Graham's articles. Under these circumstances we find Winegard did reasonably exercise and exhaust other plausible avenues of information.

Although other discovery *methods* may have been available to Winegard we do not, in this case, find any alternate approach would have been more fruitful. Neither is it for us to dictate counsel's discovery tactics. As best determinable Graham and Schalk were sole participants in the above noted telephone conversation. Thus, absent any illumination by defendant Schalk on the subject of that conversation, Graham is apparently the only remaining person who could conceivably provide the information

essential to Winegard's invasion of privacy and defamation action against Schalk and his associates.

Looking now to the third factor, this court cannot from this record say Winegard's action against Schalk and his co-defendants is facially frivolous or patently without merit.

Moreover, we find no cause to now hold Winegard is abusing "judicial process to force a wholesale disclosure of a newspaper's confidential sources of news * * *." Garland v. Torre, 259 F. 2d at 549. Neither does there appear any basis upon which to at this time hold Winegard embarked upon or has pursued a course designed to annoy, embarrass or oppress Graham. See *Garland*, 259 F. 2d at 551.

Judge Oxberger exceeded his jurisdiction or otherwise acted illegally in overruling Winegard's motion to compel discovery by deposition of Diane Graham.

VII. Because of existing peculiar circumstances set forth in Division I hereof, no useful purpose will be served by continuing in force and effect any sequestration order or orders heretofore entered by this court in connection with the instant appeal, therefore they are hereby set aside and annulled. This shall not, however, be deemed to create any precedent as to the scope and application of Code § 598.26.

WRIT SUSTAINED.

All Justices concur.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 2-58361

JOHN R. WINEGARD,

Petitioner,

v.

HON. LEO OXBERGER, Judge, Fifth Judicial District of Iowa,

Respondent.

O R D E R

(Filed December 19, 1977)

The petition for rehearing, filed on behalf of Diane Graham and The Des Moines Register and Tribune Company in the above entitled matter, has been carefully considered by the entire membership of the court and is now refused and denied.

Done this 19th day of December, 1977.

/s/ C. Edwin Moore

Chief Justice—Iowa Supreme Court

In The

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,

Petitioner,

vs.

JOHN R. WINEGARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

In the District Court of the State of Iowa
in and for Polk County

Law No. CL8-4250

JOHN R. WINEGARD,

Plaintiff,

vs.

RICHARD A. LARSEN, et al.,

Defendants.

RULING ON MOTION TO COMPEL DISCOVERY

FINDINGS OF FACT

Plaintiff's Motion for Order Compelling Discovery in the Matter of Discovery by deposition of Diane Graham filed March 10, 1975 and Diane Graham's resistance to such motion filed April 1, 1975, final briefs having been received April 25, 1975 and being brought before the Court, the Court finds:

1. That on January 8, 1975 and on January 9, 1975 the Des Moines Register and Tribune published an article written by Diane Graham concerning the dissolution of marriage proceedings between Mr. John R. Winegard and Sally Winegard.

2. An interlocutory appeal to the Supreme Court was denied concerning a ruling of the Des Moines County Court in the dissolution of marriage proceeding finding a common law marriage between the parties.

3. An action was filed in the U. S. District Court, 8th Circuit seeking to have certain Iowa Statutes and Rules of Civil Procedure declared unconstitutional.

4. Diane Graham, in the course of her regular duties as a reporter assigned to check the public files of the federal court in Des Moines, became aware of the contested issues in the Winegard action.

5. Plaintiff, John R. Winegard, is now seeking to depose Diane Graham in regard to the substance of conversations with her sources, one of whom was identified in the article, her notes and memorandums and the editing procedures which produced the articles as a means of discovery in an invasion of privacy and libel suit against the parties who were Diane Graham's sources of information.

CONCLUSIONS OF LAW

This suit on the part of Mr. Winegard and the consequent motion to compel discovery as to Diane Graham, a news reporter gives rise to an issue of which there is no decision from the Supreme Court of Iowa; namely, a party's right in a court action to depose witnesses having knowledge of facts pertaining to his or her cause of action versus the freedom of the press, a right created by the First and Fourteenth Amendments to the Constitution.

We, as a Nation, have always jealously maintained freedom of speech and press. The original thirteen colonies demanded that, before the Constitution be ratified, ten amendments be added thereto, the first one including the proscription that Congress shall make no law respecting an abridgement of free speech and press. Thomas Jefferson stated that should he be made to choose between free government and a free press he would choose the latter because given a free press, a free government could result but a free government cannot exist without a free press. From the passage of the first Alien and Sedition Acts, in the early 19th Century and their revocation, efforts to curb freedom of speech and press have been vigorously resisted and struck down.

However, we have also recognized that such freedoms are not absolute. Congress and the Courts have constantly struggled to balance freedom of the public to know and the right of the individual to privacy. The touchstone of first amendment rights is the promotion of uninhibited discussion of public issues; yet the guarantees for speech and press have never been held to be the sole

preserve of political expression or comment upon public affairs essential to healthy government. In *Time Inc. v. Hill,* 385 U. S. 374 the Court stated "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a society which places a primary value on freedom of speech and press. Courts have always weighted the balancing of interests in any such conflict in favor of the press.

Freedom of the press is chilled when members of the press are subpoenaed for court proceedings to divulge sources of information, the substance of conversations with such sources, or the editing procedures which produced the articles. Citizens are less willing to become the conduit of information to the press. In *Cervantes v. Time,* 464 F. 2d 986, 992 (8th Cir. 1972), the court stated "that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality." Further, in *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir. 1972), we read "While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances at the very least in civil cases, in which the public interest in nondisclosure of a journalist's confidential sources outweighs the public and private interest in compelled testi-

mony." *Bursey v. U. S.,* 466 F. 2d 1059 (9th Cir. 1972), extends such freedom from disclosure to identity of persons working on the paper and pamphlets, description of their jobs and details of financing the newspaper.

Case law on government enforcement of subpoenas of newsmen and newswomen suggests certain standards to be used as appropriate tests for safeguarding First Amendment rights of subpoenaed newsmen and newswomen.

In *Bursey v. U. S.,* 466 F. 2d 1059 (9th Cir. 1972), at 1082, 1086 and 1088 the Court said, "All speech, press and associational relationships are presumptively protected by the First Amendment; the burden rests on the [questioner] to establish that the particular expressions or relationships are outside its reach." Further, "Questions about the identity of persons who were responsible for the editorial content and distribution of a newspaper and pamphlets cut deeply into press freedom. Two basic ingredients of press freedom are liberty to decide what to print and to distribute what is printed . . . The fact alone that the Government has a compelling interest in the subject matter of an . . . investigation does not establish that it has any compelling need for the answers to specific questions . . . The government has failed to demonstrate that this line of interrogation bore a substantial connection to the compelling subject matter of the investigation and it has not shown that these destructive means of interrogation were necessary to vindicate its interest in protecting the President or the armed forces." This was a standard set by the Court despite the fact that this was a criminal case where public interest may have greater weight in the balancing test.

Cervantes v. Time, 464 F. 2d 986, 992 (8th Cir. 1972), states that, "absent a positive showing of relevance or materiality, a newsman need not divulge the identity of his confidential news informants." The lower court had sustained the defendant's motion for summary judgment after the plaintiff was unable to obtain certain evidence about the reporter's sources because of the claim to First Amendment protection.

A further standard was set forth in *Baker v. F & F Investment,* 470 F. 2d 778 (2d Cir. 1972), when the court pointed out that the appellants failed to demonstrate that the information was necessary, much less critical to the maintenance of their civil rights action. The Court found contrariwise in *Garland v. Torre,* 259 F. 2d at 550 (2d Cir. 1957), when it held that the infomation sought was critical and went to "the heart of the plaintiff's claim and noted that it was" not dealing with use of the judicial power to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case when the identity of the news source is of doubtful relevance or materiality.

The standard of an alternative source was used in *Democratic National Committee et al. v. McCord,* 356 F. Supp. 1394 (D. C. D. C. 1973). The U. S. District Court for the District of Columbia stated "It may be at some future date the parties will be able to demonstrate to the Court that they are unable to obtain the same information from sources other than Movants, and that they have a compelling and overriding interest in the information sought. Until that time however, the Court will not require Movants to testify at the scheduled depositions or to make any of the requested materials available to the parties."

In light of the above discussion a reporter or publisher under the First Amendment to the Constitution is not subject to court discovery procedures when such discovery is directed to ascertain the confidential sources of information, the substance of conversation with these sources, or the editing procedures which produce the articles unless the party seeking such established by clear and convincing proof that:

1. there exists a critical need for such information in order to maintain a cause of action [or] as a defense to a cause of action.
2. this critical need be of such import to the cause of action or defense that it clearly overrides the strong protections afforded to the First Amendment.
3. all possible alternate sources of the information sought have been exhausted.
4. the information sought is relevant and material to the cause of action or defense involved.

—o—

DECISION

IT IS ORDERED BY THE COURT that Plaintiff's Motion to Compel Discovery in the Matter of Discovery by Deposition of Diane Graham is hereby denied. The Plaintiff has not deposed Stephen Schalk, Richard A. Larsen and Robert C. Bradfield, the defendants.

By agreement of the parties Mr. Winegard's Motion to Compel Discovery and Diane Graham's and Des Moines

Register & Tribune Company's Application under RCP 123 for a protective order were combined and heard jointly.

The Court's ruling today disposes of the issue in the matter involving Mr. Winegard's motion.

The Court retains jurisdiction to make further order if necessary in response to the Application for a Protective Order.

———o———

RULING ON MOTION TO SEQUESTER AND TO STRIKE

The Plaintiff, Mr. John R. Winegard requests the Court to sequester and strike from the file of this proceeding the opinion of Judge Hendrickson and an Application for Interloctory Appeal.

The Plaintiff cites 598.26 Code of Iowa 1975 that forbids certain dissemination of the record and evidence in a dissolution action. This section of the Code also prohibits an "officer or other person" from giving a copy of the testimony or pleading or the substance thereof to any person other than an attorney or party to the action.

Said section applies to the record of the pleadings and evidence. Said section does not prohibit disclosure of the court findings or orders.

Said motion is denied.

/s/ Leo Oxberger

Judge of the Fifth Judicial
District of Iowa

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1276

HON. LEO OXBERGER,

Petitioner,

vs.

JOHN R. WINEGARD,

Respondent.

RESISTANCE TO PETITION FOR
WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

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IN THE

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HON. LEO OXBERGER,

Petitioner,

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Respondent.

RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

QUESTION PRESENTED

Is a litigant entitled to depose a reporter concerning a reporter's communications with a defendant in a defamation action, when the plaintiff in the defamation action has shown that the information is necessary or critical to the cause of action, that other reasonable means available by which to obtain the information sought have been exhausted (in this case in response to Request for Admissions underlying defendant denied making any of the defamatory statements attributed to him by reporter and denied knowledge of the sources) and where the defamation action is not patently frivolous?

STATEMENT OF THE CASE

January 10, 1975, suit was filed in Scott County, Iowa, by John R. Winegard in which Richard A. Larsen, Stephen L. Schalk, Robert C. Bradfield and Larsen, Schalk & Bradfield, a partnership and/or association engaged in the practice of law, were named defendants. The action was precipitated by two newspaper articles published by the Des Moines Register and Tribune Company. Within the articles are contained, among others, the following defamatory statements:

> "Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971 and have held themselves out to the community as husband and wife since that time.
>
> "A daughter from one of Sally Ann Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney.
>
> "Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers."

March 1, 1975, on notice and pursuant to the Iowa Rules of Civil Procedure, John R. Winegard attempted to depose the writer of the newspaper articles in Des Moines, Iowa. After the reporter refused to answer pertinent questions going to the heart of John R. Winegard's case, Mr. Winegard's attorneys terminated the deposition. The following statement was made:

> "Counsel for Plaintiff at this point is unwilling to proceed with the taking of the deposition because of the constant refusal by the witness to answer the questions which have been asked of the witness; that the statement has been made into the record by counsel for the witness that she is not to give testimony other than as delineated in the statement read by counsel; that consistently the witness on the advice of counsel, adopted by the witness, has refused to answer the question; that at this time there is no further purpose in proceeding with asking questions which obviously – and, as I have been assured by counsel, will be met by the same objection. So,

> therefore, it is my intention to now stop, as far as I am concerned, my further deposing of this witness, and I will, of course, proceed according to the Rules to have the witness cited to answer the questions. We will take the appropriate procedures which will be to file a motion, I believe, to compel discovery."

Examples of questions the reporter refused to answer are:

1) "What knowledge did you have on which you wrote the story which carries your byline, Plaintiff's Exhibit 2 [Jan. 8, 1975 Des Moines Tribune story]?" Deposition Transcript at 20.

2) "Would you state whether you had any conversation with a lawyer in Davenport, Iowa, named Stephen L. Schalk, on January 8th or 9th?" Deposition Transcript at 20.

3) "Did you have any conversation with any of the defendants, Mr. Larsen or Mr. Bradfield, other than Mr. Schalk?" Deposition Transcript at 20.

4) "I direct your attention to Plaintiff's Exhibit 1 and the article therein, and you have the article before you. Again, we are referring to the article published under your byline, Diane Graham, Wednesday, January 8, 1975, in the Des Moines Tribune. I direct your attention to the article. I ask if you made this statement therein – wrote this statement and caused it to be published. Reading the second paragraph, 'John R. Winegard, 54, filed the petition in U.S. District Court here claiming the woman known to the Burlington community as Sally Ann Winegard, 31, is not his common-law wife, despite facts that indicate the two have lived together since 1971 and still are living together despite the legal battles.'

Now, I will ask you, Miss Graham, please, what is the basis for the statement you made which I have just read, 'Despite facts that indicate the two have lived together since 1971'? What facts did you then know?" Deposition Transcript 22 and 23.

5) "Continuing, the statement is made, 'and still are living together despite the legal battles.' What facts did you have on which you made the written statement, 'still are living together despite the legal battles'?" Deposition Transcript at 23.

6) "Will you state from whom you received the facts on which you made the statement referred to as, 'Facts that indicate the two have lived together since 1971 and still are living together despite the legal battles'?" Deposition Transcript at 24.

7) "Continuing with the article, Miss Graham, I am now referring to what would be the sixth paragraph in the composition of the article, and I read as follows: 'And he holds to the contention that he is single despite the fact that:

'The Des Moines County District Court ruled last October that a common-law marriage existed between the two.'

"Will you state, please, on what basis you made the statement and on what facts you had on which you made the written statement from the article I have just read?" Deposition Transcript at 24.

8) "The next paragraph, which I would count as eight in the composition of the article, reads as follows:

'Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971.' Will you state whether that is a true statement which you so wrote?" Deposition Transcript at 25.

9) "Continuing with the reading of paragraph No. 8, and deleting the first part, but commencing with the – deleting the middle part, 'Mrs. Winegard's attorney, Stephen Schalk, of Davenport, said,' and now I go down to the last three lines, 'and have held themselves out to the community as husband and wife since that time.' Now, was that a correct statement when you wrote it and caused it to be published January 8, 1975?" Deposition Transcript at 25.

10) "Reading from the next paragraph, Plaintiff's Exhibit 1, 'A daughter from one of Sally Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney.'

"Would you state whether that was a true statement given to you by Stephen Schalk as you stated in the article, and whether that was true and correct

as you stated it in the article, Plaintiff's Exhibit 1?" Deposition Transcript at 26.

11) "The 13th paragraph in the composition of the article byline by you, published January 8, 1975, Plaintiff's Exhibit 1, reads as follows:

'Schalk, Sally Ann Winegard's attorney, said the answers to the detailed financial question are necessary for determining property settlements and alimony.'

"Will you state whether that statement was given to you by Stephen Schalk, preliminary and prior to your composing the article and writing it?" Deposition Transcript at 27.

12) "I believe I may have asked, and you may have objected, but for the record, I will ask again. Did you have any conversation with Stephen L. Schalk prior to writing this article?" Deposition Transcript at 28.

13) 'Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers.'

"Will you state whether Mr. Schalk did so tell you that?" Deposition Transcript at 28.

14) "Would you tell me, Diane, in a normal composition of a story, and particularly related to this story which you wrote – this story is perhaps the wrong word. Let's say news account bearing your byline, instead of story, published January 8, 1975, Plaintiff's Exhibit 1, how do you go about preparing to write a story of this sort? I use the word again. News account." Deposition Transcript at 32.

15) "Well, now, if the statement is correct that you wrote these articles for publication as dictated by counsel, then your prior statement would be incorrect if you said that you wrote the substance of paragraph No. – was it 8 you were talking about? Did you write the article or did you write the substance of the article?" Deposition Transcript at 33.

16) "So that based on advice of counsel, you don't now wish to clarify whether the statement given and dictated by counsel that you wrote the articles is correct or incorrect, or your subsequent testimony here that you wrote the substance of the paragraph that I have referred to is correct or incorrect. Is there a distinction between writing an article and writing the substance?" Deposition Transcript at 34.

17) "All right. In the statement filed by counsel in your behalf, it is stated that you are prepared to testify that the facts contained in these articles are substantially correct to the best of your knowledge. Now, I am asking that you tell me what is your knowledge on which you predicate the fact that these articles are substantially correct. I am just asking you to explain the knowledge that you – your counsel has said you have and which you are prepared to testify to." Deposition Transcript at 35.

18) "Will you please state what is the best of your knowledge, which counsel for you have today represented you have, on the basis of which counsel has further stated that the articles, Exhibits 1 and 3, are substantially correct? That is all I am asking, very simple." Deposition Transcript at 37.

19) "And have you preserved your notes?" Deposition Transcript at 38.

20) "Would you state whether the notes which you made are in your possession or someone else's possession?" Deposition Transcript at 39.

21) "If you did, when did you turn the notes over to some other person than yourself?" Deposition Transcript at 39.

22) "And I suppose I ask then, as I will and see what your answer is, who else have you talked to about it other than Mr. Smith and Mr. Riley? When I say it, I refer to the fact that I called you and requested that you save your notes and I would like to see your notes. Who did you speak with about that?" Deposition Transcript at 42.

March 11, 1975, John R. Winegard requested Admissions from Stephen L. Schalk.

April 2, 1975, Schalk filed Answers to Request for Admissions wherein he denied making any of the defamatory statements which appeared in the newspaper articles and indicated that he did not know who made the statements or communications to the reporter.

May 6, 1975, Iowa District Court refused to compel discovery from the newspaper reporter.

June 16, 1975, the Supreme Court of Iowa issued a Writ of Certiorari directed to the district court judge so that the legality of the district court's ruling could be determined.

May 12, 1976, defamation division of underlying petition survived motion for summary judgment; invasion of privacy division was dismissed.

October 19, 1977, the Supreme Court of Iowa ruled the district court judge acted illegally or exceeded his jurisdiction in overruling John R. Winegard's Motion to Compel Discovery by deposition of the reporter.

The dismissal of one division of the underlying petition, the invasion of privacy division, prior to oral argument in *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), was affirmed in *Winegard v. Larsen*, 260 N.W.2d 816 (Iowa 1977).

Statement on behalf of Hon. Leo Oxberger at page 8 of Petition for Writ of Certiorari that the Supreme Court of Iowa in *In re Marriage of Winegard*, 257 N.W.2d 609 (Iowa 1977), affirmed a trial court finding that a common law marriage existed between John R. Winegard and Sally Ann is false. The question of the existence of that alleged common law marriage is currently on appeal to the Supreme Court of Iowa. At the time of the drafting of this document, the filing of briefs has not been completed.

ARGUMENT

I. DEPOSITION OF REPORTER IS NECESSARY AND, IN VIEW OF RESPONSE TO REQUEST FOR ADMISSIONS, IS PROPER.

At page 8 of Petition for Writ of Certiorari, Petitioner states that *In re Marriage of Winegard*, 257 N.W.2d 609 (Iowa 1977), "affirmed the trial court's finding that a common law

marriage existed between [John] Winegard and Sally Ann • • •." This decision relates only to allowance of temporary attorney fees.

The quoted statement of Petitioner is not only misleading, it is inaccurate and wrong:

> "Nothing we have said here is intended to prevent [John R. Winegard] from challenging the sufficiency of the evidence to establish a common law marriage in the event of an appeal from a final judgment on the merits in the dissolution proceeding." *In re Marriage of Winegard*, 257 N.W.2d 609, 617 (Iowa 1977).

The Opinion makes it clear that all a party needs to show is a fair presumption of the existence of a marital relationship in order to entitle that party to make a request for temporary attorney fees. *See In re Marriage of Winegard*, 257 N.W.2d 609, 615 (Iowa 1977). The affirmance goes only to the showing of that quantum for the purpose of temporary attorney fees.

Additional inaccuracy in the Petition for Writ of Certiorari occurs when Petitioner implies that John R. Winegard sought to compel the testimony of a reporter in a vacuum without attempting in any way to obtain evidence elsewhere. Glossed over are the Admissions from the underlying Defendant, Stephen L. Schalk. In Response to Request for Admissions Schalk denies under oath that:

> 1) "• • • Stephen L. Schalk indicated that John R. Winegard contends that the woman known to the Burlington community as Sally Ann Winegard, is not his common-law wife, despite facts that indicate that the two have lived together since 1971 and are still living together."
>
> 2) "• • • Stephen L. Schalk indicated to the reporter that the Des Moines County District Court ruled in October of 1974 that a common-law marriage existed between John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard."
>
> 3) "• • • Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard exchanged wedding

> rings during a return flight from Las Vegas in 1971."
>
> 4) "• • • Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard have held themselves out to the community as husband and wife since a return flight from Las Vegas."
>
> 5) "• • • Stephen L. Schalk indicated that a daughter from one of the woman's (which woman Stephen L. Schalk referred to as Sally Ann Winegard) previous marriages had her last name changed to Winegard by John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard."
>
> 6) "• • • Stephen L. Schalk indicated that John R. Winegard and the woman Stephen L. Schalk referred to as Sally Ann Winegard have continued living together for more than two years since the woman Stephen L. Schalk referred to as Sally Ann Winegard filed the original dissolution of marriage papers."
>
> 7) "• • • Stephen L. Schalk indicated that the woman Stephen L. Schalk referred to as Sally Ann Winegard had filed a dissolution action against John R. Winegard."
>
> 8) "• • • Stephen L. Schalk indicated that Stephen L. Schalk had instructed the woman Stephen L. Schalk referred to as Sally Ann Winegard that she would not have to leave the house she was living in because it was as much Sally Ann's house as it was John R. Winegard's house."

Despite admitting to conversing with reporter on or about January 7, 1975, Schalk in his response to Request for Admissions claims he does not know who are the sources of information in the following excerpts from the January 8, 1975, Des Moines Tribune story:

> 1) "John R. Winegard, 54, filed the petition in U.S. District Court here claiming the woman known to the Burlington community as Sally Ann Winegard, 31, is not his common-law wife despite facts that indicate the two have lived together since 1971 and are still living together despite the legal battles."

2) "And he holds to the contention that he is single despite the fact that:
"The Des Moines County District Court ruled last October that a common-law marriage existed between the two."

3) "Mrs. Winegard's attorney, Stephen Schalk, of Davenport said the two exchanged wedding rings during a return flight from Las Vegas in 1971 and have held themselves out to the community as husband and wife since that time."

4) "A daughter from one of Sally Ann Winegard's previous marriages had her last name changed to Winegard by the two adults, according to the attorney."

5) "Winegard appealed the Des Moines County Court's decision on his marital status to the Iowa Supreme Court, but the high court refused to hear his appeal until the divorce dissolution of marriage proceedings were made final at the county level."

6) "Schalk said that despite being embroiled in divorce proceedings, John and Sally Ann have continued living together for more than two years since she filed the original dissolution of marriage papers."

What is the effect of the Admissions? Schalk denies he indicated to reporter the defamatory statements contained in the article. Schalk denies he is the source of any of the defamatory statements in the article.

Petitioner, in the Supreme Court of Iowa, attempted to characterize these Admissions as a "ploy."

Admissions are a serious and effective form of discovery:

> "• • • A denial [of a matter of which an Admission is requested] shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as true and qualify or deny the remainder. • • •" *Rule* 127, *Iowa Rules of Civil Procedure.*

Schalk denies he is the source of the defamatory statements in the article. Schalk asserts he does not know who

is the source of the defamatory statements. This is established by Schalk's Answers to Request for Admissions.

If Schalk is telling the truth, the testimony of Graham is indispensable. Who was the source? *Cf., e.g., Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958).

If Schalk is lying, the testimony of Graham is indispensable. How is John R. Winegard to prove Schalk is lying? *Cf., e.g., United States v. Liddy*, 354 F.Supp. 208 (D.D.C. 1972). A bland and broad assertion by the reporter that her articles are substantially true is no substitute for the evidence necessary for orderly judicial process.

Mr. Nixon once said he had told the complete story of Watergate.

If Schalk is lying in his Admissions and the reporter is granted a privilege in this situation, the real privilege being granted is to one such as Schalk. Schalk would be granted the privilege to falsify with impunity, secure in the knowledge that Winegard could not force the reporter to disclose what she knows. Is this the kind of privilege a court should grant?

A result contrary to that reached by the Supreme Court of Iowa would establish a license to lie and a roadblock to the orderly administration of justice.

II. THE ORDERLY ADMINISTRATION OF JUSTICE, FOUNDATIONED ON MEANINGFUL ACCESS TO THE COURTS, IS A COMPELLING INTEREST WHICH THE SUPREME COURT OF IOWA PROPERLY WEIGHS AGAINST COMPETING INTERESTS.

The issues in this action are no longer novel. They nonetheless touch on some of the most fundamental precepts of American democratic freedom.

The orderly administration of justice must not be fogged and frustrated by the shibboleth of press freedom. The very real vitality of a free press depends upon the preservation of each person's personal freedoms. Personal freedoms ultimately are preserved in the courts. An institution such as the press must not be allowed to tie any one man in chains and trample on his personal freedoms. A high-handed policy of ar-

bitrariness and a license to frustrate the judicial process is not what is or was ever contemplated by a free press.

> "• • • [T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring).

So long as the rights of one are trampled, so too are the rights of all. So long as any institution is "more equal," so long as any institution may hold itself above judicial process, the rights of those who are "less equal" have vanished.

> "No institution in a democracy, either governmental or private, can have absolute power." *Pennekamp v. Florida*, 328 U.S. 331, 355 and 356 (1946) (Frankfurter, J., concurring).

The press has a vital role to play in the American system. The vitality of that role puts upon the press a special duty and a special responsibility to come forward and perform that role in the American system which is the personification of the pursuit of justice – the giving of testimony in the witness stand.

> "In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise." *Pennekamp v. Florida*, 328 U.S. 331, 356 (1946) (Frankfurter, J., concurring).

We must never lose sight of the foundation of our system. We must never allow the finely attuned mechanism of democratic freedom to break down.

If Watergate has any lessons for the American people, those lessons are:

> 1) No institution, not even the presidency, can be given a free and arbitrary license to disregard the rights of others;
>
> 2) Ultimately, it is the judiciary that protects the rights of everyone; and
>
> 3) The touchstone of orderly judicial process is the pursuit of the truth from witnesses via the taking of testimony.
>
> "• • • [I]t is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform • • •. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. • • •" *Blair v. United States*, 250 U.S. 273, 281 (1919).

It might be easy to disregard the rights of Winegard in favor of the Des Moines Register and Tribune Company were it not for the knowledge that the rights of Winegard are the rights of everyone. These are our most fundamental rights.

These rights are the oil in the cogs of the mechanism of democratic freedom. The presidency is not an end in itself. The Des Moines Register and Tribune Company is not an end in itself.

> "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society • • • and the proper functioning of an independent judiciary puts freedom of the press in its proper perspective." *Pennekamp v. Florida*, 328 U.S. 331, 354 and 355 (1946) (Frankfurter, J., concurring).

Only by the orderly administration of justice, the pursuit of the truth in a court of law, is the mechanism of democratic freedom preserved. *Winegard v. Oxberger*, 258 N.W.2d 847 (Iowa 1977), allows that mechanism to work.

The pursuit of justice is above mystical, self-serving, selfish desires for privileges.

American constitutional justice entrusts to the Court, not to commercial printers and publishers and their editorial and business staffs, the ultimate responsibility for protecting rights personal to each and every citizen.

American constitutional justice is foundationed on citizens taking the witness stand to tell the truth. *Cf. Blackmer v. United States*, 284 U.S. 421, 438 (1932) ("It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony • • •").

There is nothing sagging or stale about the fundamental right of access to the courts and the right to every man's evidence. This foundation of American constitutional

democracy was, is, and remains the alternative to the gun battle in the streets.

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R. R.*, 207 U.S. 142, 148 (1907).

This reasoning is no less forceful today than it was in the past:

> "The privileges referred to by the Court [in *Branzburg v. Hayes*, 408 U.S. 665 (1972)] are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 709 and 710 (1974).

Supreme Court of Iowa finds:

1) Many of the statements contained in reporter's article were attributed to Schalk;

2) There exists a constitutionally based newsperson's privilege which is neither absolute nor unlimited;

3) Winegard's interest in obtaining reporter's deposition constitutes "an undiluted, compelling state interest of such persuasive force as to subordinate a newsperson's privilege to withhold confidential information";

4) The criteria for judging whether state interest is compelling is:

> a. The information must be necessary or critical to the involved cause of action or defense pled;

> b. Other reasonable means available by which to obtain information sought must be exhausted; and
>
> c. The action or defense must not be patently frivolous.

5) Winegard's discovery from reporter is necessary and critical to his cause of action; Winegard needs to know what was said to reporter and by whom;

6) In response to Request for Admissions, Schalk admitted having conversed with Graham by phone about Winegard's federal court action, but denied having made statements attributed to him by reporter's articles;

7) Request for Admissions constitutes reasonable use and exhaustion of other plausible avenues of obtaining information under the circumstances of this case;

8) While discovery methods other than Request for Admissions may have been available to Winegard, Iowa Supreme Court does not find any alternate approach would have been more fruitful; it is not for the Court to dictate counsel's discovery tactics;

9) Reporter is the only remaining person who could conceivably provide the information essential to defamation action against Schalk and his associates;

10) Winegard's action against Schalk and his associates is not patently frivolous;

11) There is no cause to hold Winegard is abusing judicial process to force a wholesale disclosure of a reporter's confidential news sources;

12) There is no basis to hold Winegard embarked or has pursued a course designed to annoy, embarrass, or oppress reporter; and

13) Judge Oxberger exceeded his jurisdiction or otherwise acted illegally in overruling Winegard's Motion to Compel Discovery of reporter.

The Supreme Court of Iowa carefully fashioned standards which protect free speech rights and interests which at the same time uphold the fundamental rights and interests the people have in meaningful access to the judicial system.

CONCLUSION

The Supreme Court of Iowa intelligently and logically applies the Constitution to the facts of this case. John R. Winegard respectfully requests that this Court decline to issue a Writ of Certiorari.

Respectfully submitted,

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